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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 388

APPALACHIAN POWER COMPANY, OHIO POWER COMPANY and INDIANA & MICHIGAN ELECTRIC COMPANY,

*Petitioners,*

—*against*—

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, L. H. PENNEY, WILLIAM W. WERNTZ and CARMAN G. BLOUGH,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 9, 1959

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IN THE

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| APPALACHIAN POWER COMPANY, OHIO POWER COMPANY and INDIANA & MICHIGAN ELECTRIC COMPANY,<br>*Petitioners,*<br>*—against—*<br>AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, L. H. PENNEY, WILLIAM W. WERNTZ and CARMAN G. BLOUGH,<br>*Respondents.* | No. .... |

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on June 17, 1959.

## OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, Levet, *J.*, is unreported as yet and is printed in Appendix A hereto. The opinion of the Court of Appeals is likewise unreported as yet and is printed in Appendix B hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Federal jurisdiction in the first instance was based upon diversity of citizenship.

## QUESTIONS PRESENTED

1. Was it not error, and in conflict with a decision of the Court of Appeals for the Ninth Circuit, to treat respondents' motion to dismiss the complaint for failure to state a claim upon which relief could be granted as a motion for summary judgment (a) when no matters outside the pleading were presented to the Court on said motion, and (b) without affording petitioners a reasonable opportunity to present all material pertinent to a motion for summary judgment?

2. Was it not error, and in conflict with decisions of this Court and other Federal Courts, to fail to accept as facts, on respondents' motion to dismiss, matters well pleaded in the complaint and, to grant summary judgment in the face of issues of fact revealed by the record before the Court?

3. Did not the decision below depart from the New York rule that it is an actionable tort intentionally to inflict harm on another without legal justification?

4. Do the District Courts, sitting as courts of equity, lack power to enjoin the publication of tortious words by a professional organization?

## FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Federal Rules of Civil Procedure here involved are Rules 12 and 56, the pertinent portions of which are printed in Appendix C hereto.

## STATEMENT OF THE CASE

Petitioners are three operating electric public utility companies. Respondent American Institute of Certified Public Accountants (the "Institute") is a national organization of certified public accountants with more than 33,000 members. The individual respondents are the President of the Institute, the Chairman of its Committee on Accounting Procedure (the "Committee") and its Director of Research (Complaint, pars. 2-5, 7).[1]

Petitioners sought in this action to restrain the distribution by respondents to the 33,000 members of the Institute and other accountants and members of the business community of a proposed letter opinion to the effect that certain accounting practices and procedures with respect to accounting for credits for deferred taxes (followed by petitioners and some other electric public utility companies) heretofore recognized by all as generally accepted accounting principles are now to be regarded as improper. The proposed letter is set forth in full in the opinion of the District Court (D. C. Opinion, p. 3).

The petitioners have recorded on their books, in accordance with orders of the state regulatory agencies having

[1]There is no printed record herein. When petitioners moved for an injunction pending appeal to the Court of Appeals, said motion was heard on the original record from the District Court. The argument on said motion was then, with the consent of the parties, considered to be the argument of the appeal. The original record, duly certified, has been submitted to the Clerk of this Court together with nine photostatic copies of the pertinent portions thereof. The numbered pages of the certified record from the District Court will be referred to as "D. C. p. ", and those from that of the Court of Appeals as "C. A. p. ".

jurisdiction over them, more than $65,000,000 in accounts designated as "Earned Surplus Restricted for Future Federal Income Taxes". The complaint alleged that, by reason of the prestige and authority of the respondents in the accounting profession and the business community, the distribution of the proposed opinion would cause substantial numbers of accountants, financial institutions, investment banking concerns, rating services, financial analysts and governmental agencies to question the continued inclusion of that $65,000,000, which represents credits for deferred taxes, in the above described accounts or in any other part of the stockholders equity section of the balance sheet, with the result that petitioners would be seriously interfered with in their dealings and relationships with such persons and institutions, and that a further question would be raised as to the validity of the announced debt ratios of the petitioners, which were the bases upon which they had in the past, and proposed in the future, to borrow and sell securities to finance current construction programs which had been budgeted at more than $100,000,000 for the year 1959 alone (Complaint, pars. 6, 9-30).

It is petitioners' position that the facts presented in the verified complaint established all of the elements of a prima facie tort under settled principles of New York law and called for the exercise of the injunctive power of a court of equity to protect the petitioners from immediate and irreparable harm—in short, that the respondents were, without justification and with intent to injure, about to inflict irreparable harm upon petitioners.

The complaint alleged, first of all, that the stated purpose for distributing the proposed letter was spurious and that the Committee did not have, and could not have had, the intent claimed in the proposed letter. It further alleged that the respondents with full knowledge of the harm which would be caused to petitioners thereby, intended to cause that harm, that respondents had no legal justification for

causing such harm, and that they were acting wilfully, wantonly and recklessly in preparing to distribute the letter. It was also alleged that the respondents had completely abdicated their responsibility and duty to use some minimum standards of care in formulating this pronouncement which they knew would harm others, that they had taken no steps whatever reasonably designed to ascertain its propriety or correctness and, indeed, that they even had failed to follow their own well established practices and procedures heretofore used by them in connection with the distribution of opinions upon accounting matters (Complaint, pars. 18-30).

The action was commenced by the filing of the verified complaint on April 15, 1959 (D. C. pp. 1-14). Simultaneously therewith, Hon. Edward L. Palmieri, Judge of the United States District Court, signed an order to show cause bringing on a motion by petitioners for a preliminary injunction and containing a temporary restraining order enjoining the respondents from distributing the proposed letter pending a hearing on that motion (D. C. pp. 17-40). The preliminary injunction and temporary restraining order were sought because petitioners were unable to secure from respondents any commitment to delay the distribution of the proposed letter (Whitman aff., par. 6).

On May 1, 1959 respondents served a Notice of Cross-motion for an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the complaint on the ground that it failed to state a claim upon which relief could be granted (D. C. pp. 49-51). No affidavits or other materials were served in support of that motion, and no motion for summary judgment was made then or later.

On May 6, 1959 respondents served three affidavits in opposition to petitioners' motion for a preliminary injunction, and on May 7, 1959 petitioners served an affidavit in reply thereto. Examination of the captions and substance of these affidavits shows that neither party considered them to be submitted on the motion to dismiss but that they were

all submitted on the motion for a temporary injunction (Werntz, Beatty, Christie and Cook affs.).

Both the motion for a temporary injunction and the motion to dismiss for failure to state a claim were heard before Hon. Richard H. Levet on May 7, 1959. From the bench, the restraining order was continued pending decision. The District Court's opinion was filed on May 21, 1959 (D. C. pp. 222-36). It held that petitioners' motion for a temporary injunction must be denied, that respondents' motion had been treated as one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and that summary judgment must be entered dismissing the complaint.

At no time, however, on the argument or otherwise, had there been any suggestion that the motion to dismiss was to be treated as one for summary judgment, and petitioners were given no opportunity to take depositions or to submit affidavits in support of the well-pleaded allegations of the verified complaint. Examination of the record reveals that such proofs would have been readily available and forthcoming.

Judge Levet did, however, sign an order enjoining the distribution of the proposed letter pending the making of an application to the Court of Appeals for the Second Circuit for an order restraining its distribution pending appeal (D. C. pp. 237-40). Such an application was made (C. A. pp. 3-9) and argued before the Court of Appeals on June 4, 1959. The Court of Appeals granted that application from the bench (C. A. pp. 1-2), and on consent of the parties the briefs and argument on that motion were considered as the briefs and argument on the appeal on the merits (C. A. p. 16).

On June 17, 1959 the Court of Appeals filed its decision affirming the judgment below and vacating the stay (C. A. pp. 14-16).

On June 19, 1959 Hon. J. Edward Lumbard, *J.* of the Court of Appeals, signed an order restraining the distribution of the proposed letter pending an application to a Justice of this Court for a stay pending action on this petition for review on writ of certiorari (C. A. pp. 24-27). Said application was duly made before Mr. Justice Brennan (in the absence of Mr. Justice Harlan) and was denied by him in a memorandum dated July 7, 1959, a copy of which is printed in appendix D hereto.[2]

## REASONS FOR GRANTING THE WRIT

### I.

**THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *PACIFIC AMERICAN FISHERIES* v. *MULLANEY*, 191 F. 2d 137 (9th CIR. 1951) IN SO FAR AS IT APPROVED THE TREATING OF RESPONDENTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AS A MOTION FOR SUMMARY JUDGMENT.**

The only authority for treating a motion to dismiss as one for summary judgment is found in Rule 12(b) of the Federal Rules of Civil Procedure which states:

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[2]Subsequent to the said denial by Mr. Justice Brennan, the proposed letter was distributed. In their brief and argument on said application, respondents pointed out to Mr. Justice Brennan, and it is therefore conceded, that the denial of the restraint and the subsequent issuance of the letter would not eliminate the controversy and would not render the case moot even in so far as equitable relief is concerned. Petitioners had sought, in addition to an injunction, such other relief as the Court might deem proper. Respondents pointed out, for example, that petitioners might obtain a declaratory judgment that respondents' acts in issuing the letter were tortious (Rule 54(c) of the Federal Rules of Civil Procedure; *Becker* v. *Buder*, 88 F. Supp. 609, 613 (E. D. Mo. 1949), aff'd, 185 F. 2d 311 (8th Cir. 1950)) and that petitioners could still recover damages even though the later event had made the granting of injunctive relief nugatory (*Subin* v. *Goldsmith*, 224 F. 2d 753, 761-2 (2d Cir. 1955)).

> "* * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

On the face of the above-quoted Rule, two things are prerequisite to the power of the District Court to convert a motion to dismiss into a motion for summary judgment, to wit, (a) matters outside the pleading must be presented to the court on the motion to dismiss, and (b) all parties must be given reasonable opportunity to present all material pertinent to a motion for summary judgment. It is entirely clear that neither of these prerequisites was satisfied in the instant case.

No matters outside the pleading were presented to the court on the motion to dismiss. The only affidavits before the court were there only on the motion for a temporary injunction, and were not intended by either side for consideration on the motion to dismiss. The three affidavits submitted on behalf of respondents were each entitled "Affidavit in Opposition to Plaintiffs' Application for Preliminary Injunction" (Werntz, Beatty and Christie Affs.). The affidavit of Robert O. Whitman, submitted by the petitioners, stated that it was "* * * submitted in support of plaintiffs' application * * * for a preliminary injunction and * * * temporary restraining order" and the affidavit of Donald C. Cook likewise stated that it was "* * * submitted in support of plaintiffs' application * * * for an order granting a preliminary injunction herein and in reply to the affidavits submitted in opposition to said motion." (Whitman aff., par. 2; Cook aff. par. 2).

Petitioners, moreover, had no intimation at any time up to the date of the filing of the District Court's opinion that the motion to dismiss would be treated as a motion for summary judgment. Accordingly, petitioners were deprived of their important right under Rule 12 to have an opportunity to prepare and submit affidavits and other proofs or to request permission to take depositions or to have discovery in accordance with the provisions of Rule 56.[3]

The importance of this latter right is underscored by the statement of the revisers made at the time of the 1946 amendment to Rule 12 that:

> "* * * It will also be observed that if a motion under rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. * * *" (Report of Proposed Amendments, Advisory Committee on Rules for Civil Procedure, June 1946, pp. 14-15)

The denial of this opportunity was a denial of substantial rights of the petitioners and of the due process required by the Federal Rules and by principles of fairness. Summary judgment is a useful device for avoiding trials where there are no issues of fact or when the complaint is frivolous, but it can be a dangerous snare when used to preclude the identification and presentation of issues of fact.

The record thus incontrovertibly shows that the District Court and the Court of Appeals were mistaken in stating

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[3]Respondents' counsel suggested in argument before Mr. Justice Brennan that, since, after the decision by the District Court and when counsel were before that Court on the question of a stay, no objection was made to the disposition of this matter as on summary judgment, some kind of estoppel should be applied. Of course, at that stage, protest was quite futile in face of an existing adverse decision. In our view, appeal and not re-argument is the proper, and indeed, usually the only effective method of correcting error.

that "* * * matters outside the pleadings have been presented to the court, and since the parties have submitted such proof * * *" (D. C. Opinion, pp. 3-4) and that "both parties had filed supporting affidavits to their motions. * * *" (C. A. Opinion, p. 2). It is clear that even if such were the case, the only proper and fair procedure is that followed in *Huke* v. *Ancilla Domini Sisters*, 267 F. 2d 96 (7th Cir. 1959), where, in sharp contrast to this case, the Rule was properly applied. There the District Court notified the parties that it was going to consider the motion to dismiss as one for summary judgment since the parties had submitted affidavits and gave them ten days to submit "all material pertinent to such motion." To the same effect see *Herron* v. *Herron*, 255 F. 2d 589 (5th Cir. 1958); *Martin* v. *Broadcast Music*, 248 F. 2d 530 (9th Cir. 1957); and *Slagle* v. *United States*, 228 F. 2d 673 (5th Cir. 1956), all of which emphasize the importance of giving opportunity to present all pertinent matter when a motion to dismiss is converted to one for summary judgment.

The action of the Courts below in this regard conflicts not only with the plain requirements of Rules 12(b) and 56, but with the decision in *Pacific American Fisheries* v. *Mullaney*, 191 F. 2d 137 (9th Cir. 1951). In that case similar treatment of a motion to dismiss by the trial court was held to be ground for reversal. The Court in that case said:

> "Upon hearing on this motion the court determined to treat the motion as one for a summary judgment, and ordered that such judgment be entered for the defendant. It does not appear that either party was afforded an opportunity to make any further showing by way of affidavit or otherwise after the court determined to treat the motion as one for summary judgment. * * *
>
> * * * * *

Appeal was taken both from the order denying a temporary injunction and from the summary judgment. With respect to the summary judgment, appellant contends that irrespective of all other considerations, it was error for the court to undertake to treat the motion for judgment on the pleadings as a motion for summary judgment and then proceed to grant that judgment without giving the appellant an opportunity to present evidence on the questions of fact involved. * * *

* * * * *

We think that the contention that the entry of a summary judgment was erroneous under the circumstances is sound. * * *

* * * * *

When we turn to those portions of the complaint directed to appellant's claim for an injunction, it would appear that if the allegations of the complaint were true, appellant was without an adequate remedy at law and threatened with irreparable injury. * * *

* * * * *

* * * The genuineness of the issue and the materiality of the facts were not disproven by the fact that the appellee denied the allegations of the complaint * * *.

* * * * *

Because of the importance of the issues presented in this suit, we think that it was not one to be disposed of by summary judgment, even if proper motion for such judgment had been made or proper opportunity afforded for appropriate showing by affidavit or otherwise. * * *" (191 F. 2d at 139-141)

This action thus presents a conflict between Circuits with respect to the proper interpretation to be given to Rule 12(b) and as to the proper procedures to be followed on motions to dismiss. This is an important question of fed-

eral procedural due process which merits the attention of this Court because of its far reaching effect on litigants in the federal courts.

While errors in interpretation of the Rules may sometimes not be sufficiently important to call for this Court's review, here departure from the plain language of the Rule has caused the kind of unfairness which this Court has been alert to prevent and has raised an important question as to the proper application of the Rules. Cf. *Societe Internationale* v. *Rogers*, 357 U. S. 197 (1958); *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952); *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948); *Anderson* v. *Yungkau*, 329 U. S. 482 (1946); *Arenas* v. *United States*, 322 U. S. 419 (1944); *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620 (1944).

## II.

**THE COURT OF APPEALS, IN APPROVING THE DISTRICT COURT'S ACTION IN DECIDING CONTESTED ISSUES OF FACT ON RESPONDENTS' MOTION TO DISMISS, HAS SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE AND FROM THE HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS FOR THE OTHER CIRCUITS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

The District Court was able to reach its decision only by deciding issues of fact as to which there were conflicting statements in the verified complaint and in the affidavits submitted by the parties on the injunction motion. Of course, had the court not erroneously treated the motion to dismiss as one for summary judgment, judgment could not have been entered for the respondents, for all matters well pleaded in the verified complaint would have had to be treated as true and established, and the applicable test would

have been the rule that no complaint can be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957); 2 Moore, *Federal Practice*, p. 2245 (2d ed. 1948). Neither Court below held, nor could it have held, that the verified complaint on its face did not state a claim upon which relief could be granted.

But apart from this error in converting the motion to dismiss into one for summary judgment, the District Court clearly erred in making findings of fact rather than limiting itself to an inquiry as to whether any issues of fact existed. This Court and the Courts of Appeals for each of the Circuits have long since held that jurisdiction to grant summary judgment should be exercised with caution and only in the clearest of cases and that no power exists to determine issues of fact upon motion. *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 719, 744 (1945), *adhered to on rehearing*, 327 U. S. 661 (1946); *Arenas* v. *United States*, 322 U. S. 419, 431 (1944); *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620 (1944); for decisions from the Courts of Appeals for each Circuit, see 6 Moore, *Federal Practice*, p. 2107 *et seq.* (2d ed. 1953).

The District Court itself recognized that the elements of the tort alleged consisted of intention to injure, lack of legal justification and damage (D. C. Opinion, pp. 9-12). The Court of Appeals added the element of actual malice (C. A. Opinion, p. 3). Each of these elements entails facts, circumstances, actions and statements of people, and is a question of fact which should not and cannot be decided on the basis of conflicting affidavits and which precludes the entry of summary judgment.

As to the specific issues, for example, the District Court found as a fact that the proposed letter "was adopted

by the Committee in conformity with its established procedures" (D. C. Opinion, p. 6), whereas the verified complaint and the reply affidavit in support of the motion for a preliminary injunction specifically alleged that the Committe did not follow its established procedures and practices, pointing out that there was a departure from the Committee's previous practices and procedures of giving wide circulation to so-called exposure or ballot drafts, of giving opportunity to interested parties to express their views on the subject in issue and giving consideration to the prior opinions of the respondents themselves (Complaint, pars. 15, 18, 22, 25; Cook aff. pars. 26, 27).

The District Court also found that there was no intent to harm petitioners, whereas such an intent was pleaded (Complaint, par. 30), and petitioners have been denied the right to prove that allegation of fact, which, of course, could be proved only by examination and cross-examination and is incapable of determination on affidavit.

The District Court did not even mention the allegation of the complaint as to the falsity of the statement in the proposed letter with respect to the intent of the Committee in issuing it, although the facts, including admissions of the respondents, in support of this allegation, are documented in the record (Complaint, pars. 18, 19, 22 and 23; Cook aff. pars. 19-20). This issue of fact must have been resolved against petitioners for the Court referred to "honest opinions" (D. C. Opinion, p. 14). The Court of Appeals likewise failed even to give recognition to this issue, but nevertheless stated that the proposed opinion was "honestly held" (C. A. Opinion, p. 3).

And the Court of Appeals, having held (erroneously, we submit) that a showing of actual malice or its equivalent was necessary to support the relief requested, (C. A. Opinion, p. 3) must have determined that respondents were acting without actual malice, and this without giving peti-

tioners the opportunity to prove the allegation of the complaint that respondents were acting in wanton, reckless and wilfull disregard of petitioners' rights and with intent to injure petitioners (Complaint, par. 30).

We submit that the disposition of an important action, involving large sums of money and affecting the consuming public, by determining issues of fact on the basis of conflicting statements contained in affidavits, is such a departure from the established rules of law with respect to motions for summary judgment, so in conflict with the basic requirements of decisions of this Court and other federal courts, and such a departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

## III.

## THE DECISION OF THE COURT OF APPEALS IN THIS ACTION IS AN UNJUSTIFIED DEPARTURE FROM THE LAW OF THE STATE OF NEW YORK WHICH IS HERE CONTROLLING.

The doctrine of prima facie tort has been for some time an important part of the law of the State of New York, which law is controlling in this case under the *Erie* v. *Tompkins* doctrine. The decision in this action departs from and thus essentially disregards the applicable decisions of the New York Court of Appeals. The leading New York case in the field of prima facie tort is *Advance Music Corporation* v. *American Tobacco Co.*, 296 N. Y. 79 (1946). That case is strikingly similar to the instant one and should have been treated as controlling. Other apposite New York opinions in this field are *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348 (1941) and *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226 (1941).

Analysis of the complaint and the opinion of the New York Court of Appeals in the *Advance Music* case indicates that the District Court's statement that it is "basically different" from the instant case is erroneous (D. C. Opinion, p. 13). The complaint in that case alleged that plaintiff was engaged in the business of publishing musical compositions; that defendants sponsored and produced a well known weekly coast-to-coast radio program, the Hit Parade; that on said program defendants listed and had performed the supposedly nine or ten most popular songs of the week, claiming that these popularity ratings were based upon an extensive and accurate nationwide survey; that the defendants' ratings and listings of songs were in fact the result of caprice or other considerations foreign to a selection based on an accurate and extensive nationwide survey; and that some of plaintiff's songs which were actually among the most popular of the day were either completely ignored by the defendants or given an improper rating.

The complaint went on to allege that plaintiff was suffering damages in that retail purchasers, entertainers and other customers and potential promoters of songs, influenced by defendants' inaccurate ratings, failed to purchase plaintiff's compositions, and that the acts and representations of the defendant were made wantonly, in bad faith and with intent to injure plaintiff.

The Court of Appeals reversed a dismissal of the complaint and held that the facts pleaded stated a cause of action. The Court said:

> "The foregoing [allegations]. * * * are there followed by the further allegation that 'the aforesaid acts and representations on the part of the defendants are made with intent to injure the plaintiff'. Thus in sum and substance the second cause of action constitutes a statement to this effect: *The defendants are wantonly causing damage to the plaintiff by a system of conduct on their part which*

*warrants an inference that they intend harm of that type.* So read, the second cause of action is, we think, adequate in its office as a plaintiff's pleading. (Emphasis added.)

In *Skinner & Company* v. *Shew & Company* [1893], (1 Ch. 413, 422) Lord Justice BOWEN said: 'At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse'. * * * These broad propositions were approved by Sir FREDERICK POLLACK as authority for his doctrine that all willful harm is actionable unless the defendant justify or excuse his conduct. (Pollack, The Law of Torts [14th ed.], 17-18.)" (296 N. Y. at pp. 83-84)

* * *

"The justification that is required in a case like this must, of course, be one which the law will recognize. * * *" (citations omitted, 296 N. Y. at p. 85)

The court below, in its *per curiam* opinion on this important question of state law, in effect refused to treat this decision as controlling and, instead, struck out on its own and added to the elements of prima facie tort as enunciated by the New York Court of Appeals the requirement of a showing of "actual malice" (C. A. Opinion, p. 3). But in the *Advance Music* case, the Court of Appeals had said that an allegation that a party was wantonly causing damage warranted an inference that they intended such harm and that such an allegation was sufficient. And in the *American Guild of Musical Artists* case, the Court of Appeals specifically held that actual malice was an unnecessary allegation, since malice in the law of New York does not mean ill-will against a person but merely intentional action without justification. In *Campbell* v. *Gates*, 236 N. Y. 457, 460 (1923), moreover, it was said that a malicious act is one "* * * done

intentionally, without just cause or excuse, and from this a malicious motive is to be inferred. This does not necessarily mean actual malice or ill-will, but the intentional doing of a wrongful act without legal or social justification."

The opinions below in this action depart from and therefore conflict with and give inadequate weight to the applicable and controlling decisions of the New York Court of Appeals on this important question of New York law.

## IV.

**THIS ACTION RAISES AN IMPORTANT QUESTION CONCERNING THE EQUITY POWERS OF THE FEDERAL JUDICIARY ON WHICH THERE IS NO CONTROLLING DECISION OF THIS COURT AND ON WHICH THERE IS AT LEAST IMPLICITLY A CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE THIRD CIRCUIT.**

The Court of Appeals said:

> "* * * We think the courts may not dictate or control the procedures by which a private organization expresses its honestly held views. Defendants' action involves no breach of duty owed by them to the plaintiffs. On the contrary every professional body accepts a public obligation for unfettered expression of views and loses all right to professional consideration, as well as all utility, if its views are controlled by other criteria than the intellectual conclusions of the persons acting.* * *" (C. A. Opinion, p. 3).

The record will show that the above quotation from the Court of Appeals decision resulted from the respondents' contention, fully briefed and argued below, that the complaint should be dismissed on the ground that it "* * * seeks to restrain the freedom of expression of opinion of the * * * [respondents'] on a matter of public concern and interest,

in violation of the rules of the common law and of the First Amendment to the United States Constitution.* * *" (D. C. pp. 49-51). It was thus an acceptance of limitation on the equity power of Federal courts, which we believe was erroneous and presents a grave question warranting this Court's review.

That part of the decision seems clearly to be a holding that a Federal court of equity may not enjoin tortious speech by a professional organization and that there is no limitation upon the right of such a body to express itself, for it is in substance an approval of the District Court's holding that the purposes alone of a professional organization are "* * * adequate justification, if justification, indeed, be required * * *" of such a body (D. C. Opinion, p. 14). But this creates a classification of private organizations above the law, who may express themselves with impunity and not be answerable for their torts as all other are. There is no basis for conferring such immunity. We submit, on the contrary, that a professional organization, like any other individual or body corporate, may be enjoined from the intentional infliction of harm without justification, that the fact that the organization uttering the words is professional in nature is irrelevant, and that a federal court sitting as a court of equity has the power and duty to enjoin tortious words. No principle of law, or requirement of the Constitution, binds the hands of a federal equity court from restraining a private wrongdoer in such circumstances as are presented here.

This important question was expressly left open by this Court in *Near* v. *Minnesota*, 283 U. S. 697 (1931) where the Court said:

> "* * * Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." (283 U. S. at p. 716)

The New York Court of Appeals has long since ruled that there is no limitation on the power of courts of equity to enjoin tortious speech. This is made clear not only by the cases cited above but was specifically pointed out by Chief Judge Cardozo in *Nann* v. *Raimist*, 255 N. Y. 307, 317 (1931), where, in discussing the power of a court of equity to enjoin publications, he wrote:

> "* * * Equity does not intervene to restrain the publication of words on a mere showing of their falsity. * * * It intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with impairment by illegal combinations or by other tortious acts, the publication of the words being merely an instrument and incident * * *. (Citations omitted.)".

This Court, through Mr. Justice Holmes in *American Bank & Trust Company* v. *Federal Reserve Bank*, 256 U. S. 350 (1921), reversed the dismissal of a complaint in an action for an injunction and said:

> "* * * A man has a right to give advice, but advice given for the sole purpose of injuring another's business and effective on a large scale, might create a cause of action. * * * If without a word of falsehood but acting from what we have called disinterested malevolence a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. * * *" (256 U. S. at 358)

A leading decision by a federal court in an action in which objection was raised to the granting of an injunction to restrain tortious conduct is *Black & Yates* v. *Mahogany Ass'n*, 129 F. 2d 227 (3d Cir. 1941). There, in reversing the denial of injunctive relief and restraining statements by the defendant which tended to injure the plaintiff's business, the court said:

> "* * * The irrevelance of 'free speech' and of 'a libel is for a jury' are patent. Freedom of discussion of public issues does not demand lack of 'previous restraint' for injury to private individuals.* * *
>
> We are quite willing to repudiate the 'waning doctrine that equity will not restrain the trade libel'. We are further willing to do so directly and without hiding behind the other equitable principles put forward in some of the cases." (129 F. 2d at p. 231)

This action thus presents important issues of law concerning the power of a court of equity to compel obedience to law and prevent injury, on which this Court has not directly ruled and as to which the decision below appears to conflict in principle with opinions of this Court, of the Third Circuit and of the New York Court of Appeals.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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RICHARD M. DICKE,
WILLIAM J. MANNING,
SIMPSON THACHER & BARTLETT,
*Of Counsel*

## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

October Term, 1958.

(Argued June 4, 1959 Decided June 17, 1959.)

Docket No. 25715

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APPALACHIAN POWER COMPANY, OHIO POWER COMPANY and INDIANA & MICHIGAN ELECTRIC COMPANY,

*Plaintiffs-Appellants,*

—v.—

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, L. H. PENNY, WILLIAM W. WERNTZ and CARMAN G. BLOUGH,

*Defendants-Appellees.*

---

Before:

CLARK, *Chief Judge,* and
LUMBARD and WATERMAN, *Circuit Judges.*

---

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, *Judge.*

Appalachian Power Company and others appeal from a decision of Judge Levet, D. C. S. D. N. Y., May 20, 1959, denying a temporary injunction and granting summary judgment dismissing their complaint on defendants' motion under Fed. R. Civ. P. 12.

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WHITNEY NORTH SEYMOUR of Simpson Thacher & Bartlett, New York City (Richard M. Dicke and William J. Manning, of Simpson Thacher & Bartlett, New York City, on the brief), *for plaintiffs-appellants.*

HOWARD C. WESTWOOD, of Covington & Burling, Washington, D. C. (Fontaine C. Bradley, Stanley L. Temko, George C. Christie, and Phil R. Stansbury, of Covington & Burling, Washington, D. C., on the brief), *for defendants-appellees.*

---

PER CURIAM:

On a theory of prima facie tort, plaintiffs seek to enjoin defendants, a professional association of accountants and several of its officers, from distributing to its members and others a letter to the effect that the Institute considers certain accounting procedures improper. Plaintiffs allege that in the preparation of this letter the Institute disregarded its usual practice of circulating proposed opinions for comment prior to their issuance and that the promulgation of the views contained in the letter, because of the Institute's authority in the accounting profession and in the business community, will impair plaintiffs' credit and limit their growth.

The court below properly considered this action as on a motion for summary judgment once both parties had filed supporting affidavits to their motions. Fed. R. Civ. P. 12(b) specifically authorizes this procedure, and we do not see that plaintiffs were denied the opportunity to present materials pertinent to summary judgment which the rule provides.

On the merits we agree with Judge Levet's reasoned opinion below, D. C. S. D. N. Y., May 20, 1959. We think the courts may not dictate or control the procedures by which a private organization expresses its honestly held views. Defendants' action involves no breach of duty owed by them to the plaintiffs. On the contrary every profes-

sional body accepts a public obligation for unfettered expression of views and loses all right to professional consideration, as well as all utility, if its views are controlled by other criteria than the intellectual conclusions of the persons acting. Absent a showing of actual malice or its equivalent the courts would be making a great mistake, contrary indeed to their own ideals and professions, if they assumed to restrict and denigrate this widely recognized and assumed professional duty.

By stipulation of the parties this appeal was heard both upon the appellants' motion for a stay and upon the merits. Our order must therefore be that the stay heretofore granted is vacated and the judgment below is affirmed.

## APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| APPALACHIAN POWER COMPANY, OHIO POWER COMPANY and INDIANA & MICHIGAN ELECTRIC COMPANY,<br>*Plaintiffs,*<br>*—against—*<br>AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, L. H. PENNEY, WILLIAM W. WERNTZ and CARMAN G. BLOUGH,<br>*Defendants.* | Civil 145-161 |

### OPINION

APPEARANCES:

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—and—

Covington & Burling
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Rinaldo L. Bianchi, George C. Christie,
Phil R. Stansbury,
Of Counsel.

LEVET, *D. J.*

This is a motion for preliminary injunction to restrain the defendants from the promulgation or distribution of certain opinions recommending certain accounting practices which allegedly affect plaintiffs' financial statements, unless a waiting period of 60 days elapses, and certain other prerequisites are complied with.

The above-named plaintiffs, public utility companies, engaged in the sale of power, seek a preliminary injunction to enjoin the defendant American Institute of Certified Public Accountants (hereinafter called "Institute") and the individual defendants, certain officers or Committeemen of said Institute, from adopting, issuing, promulgating, circulating, printing or in any manner publishing to the members of the defendant Institute or to any members of the accountancy profession a certain proposed letter. This letter is to the effect that the said defendant Institute or its Committee on Accounting Procedure (hereinafter called "Committee") is of the opinion or recommends that charges made to income in recognition of the deferral of income taxes should not, in accordance with generally accepted accounting principles, be credited to earned surplus or to any other account included in the stockholders' equity section of the balance sheet. The plaintiffs seek to enjoin the distribution of said letter until such time as the defendants and the Committee shall have submitted a draft thereof to certain persons; a period of not less than 60 days shall thereafter have elapsed, and the Institute's and its Committee's practices and procedures with respect to the publication of accounting research bulletins shall otherwise have been complied with.

This letter in dispute is as follows:

"AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

"270 Madison Avenue,
New York, 16, N. Y.

"April 15, 1959

"To the Members of the American
Institute of Certified Public Accountants

"Gentlemen:

"Question has been raised with respect to the intent of the committee on accounting procedure in using the phrase 'a deferred tax account' in Accounting Research Bulletin No. 44 (revised), *Declining-balance Depreciation*, to indicate the account to be credited for the amount of the deferred income tax (see paragraphs 4 and 5).

"The committee used the phrase in its ordinary connotation of an account to be shown in the balance sheet as a liability or a deferred credit. A provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

"Three of the twenty-one members of the committee, Messrs. Jennings, Powell and Staub, dissented to the issuance at this time of any letter interpreting Accounting Research Bulletin No. 44 (revised).

"COMMITTEE ON ACCOUNTING PROCEDURE
"By William W. Werntz, Chairman"

By cross-motion the defendants have moved for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint on the ground that it fails

to state a claim against them upon which relief can be granted. Since matters outside the pleadings have been presented to the court, and since the parties have submitted such proof, I am treating this motion as one for summary judgment as provided in Rule 56 of the Federal Rules of Civil Procedure.

The compliment herein, seeking permanent injunctive relief, was filed on April 15, 1958. This application apparently is based upon the following assertions of the plaintiffs:

(1) Plaintiffs, three operating electric utility companies, have recorded on their books of account, pursuant to certain alleged applicable requirements of state regulatory agencies, an aggregate of more than $65,000,000 in accounts designated as "Earned Surplus Restricted for Future Federal Income Taxes." In this connection plaintiffs contend that these amounts have been so accrued by them in accordance with accounting principles which heretofore have been generally accepted over a period of years by all of the well-known accounting firms experienced in utility accounting.

(2) The defendant Institute, through its Committee, from time to time publishes accounting research bulletins which are allegedly "accepted" by state and federal regulatory agencies, including the Securities and Exchange Commission, members of the accounting profession and interested members of the business community as establishing the accounting principles which must be followed by the accounting profession.

(3) Prior to the present dispute in reference to pertinent accounting procedures, it is said that the Institute had adopted procedures prerequisite to the publication of such opinions and recommendations. The procedures included, it is said, the circulation of so-called "exposure drafts of any proposed opinion" to a certain group so that the members might comment thereon, and a further procedure involving the submission of a so-called "ballot draft" to members of the Committee so that they could vote upon the proposed opinion.

(4) Plaintiffs aver that the defendants have known accounting practices of plaintiffs in reference to these matters

and have had full knowledge that plaintiffs have accumulated more than $65,000,000 in these accounts.

(5) It appears that in a proceeding before the Securities and Exchange Commission the Chairman of defendant's Committee and its Director of Research stated that they were about to mail under the authority of the Institute and the Committee to members of the Institute and other recipients of bulletins a letter with respect to the deferred tax account to the effect that "a provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet."

(6) Plaintiffs claim that the defendants in preparing and intending to publish this letter are "without legal justification," that their acts "bear no reasonable relationship to any benefits which the defendants may be seeking or to any legitimate purpose," and that the actions of the defendants in connection with the proposed distribution of the said letter and the opinion contained therein are "in wanton, reckless and wilful disregard of the said consequences of their proposed action."

(7) As a result, plaintiffs assert that substantial numbers of accountants, financial institutions, etc. will question the plaintiffs' continued inclusion of credits for deferred taxes in earned surplus and as a result plaintiffs "will be seriously interfered with in their dealings," etc. and, as stated by Donald C. Cook, a vice-president of each of the plaintiff corporations:

> "* * * The removal of more than $65,000,000 from the common stock equity of the plaintiffs would, in the first instance, have the effect of limiting the short term borrowing power of plaintiffs under applicable statutes so as to decrease the amounts which plaintiffs can borrow from banks by $6,500,000. * * *" (Affidavit sworn to May 6, 1959, item 21, p. 13)

The defendants in their opposing papers point out that:

(1) The letter, the issuance of which, without certain preliminaries, plaintiffs oppose, was adopted by the Committee in conformity with its established procedures; was specifically approved by over two-thirds of the 21 members of the Committee; that under the Committee's procedure a two-third vote—that is, 14 out of 21 members—is sufficient to adopt an opinion or recommendation.

(2) The opinions of the Committee have no official effect.

(3) The Committee procedures do not require the so-called "exposure" in draft form of the proposed letter, though on occasion in the past, this "exposure" procedure has been employed.

(4) a. The Committee's position as to the accounting practice in question is followed by Arthur Andersen & Co., public accountants, who audit the accounts of one-third of the utility companies in the country;

b. Based on a survey of the 1957 published stockholders' reports of 353 utility companies, of 220 companies reporting an accumulated credit resulting from the use of the liberalized depreciation under § 167 of the Internal Revenue Code, 176 treated the credit outside the equity-capital section of the balance sheet and only 50 treated the credit as either earned surplus or restricted surplus;

c. The Public Service Commission of the State of Indiana has ordered all companies subject to its regluations, including plaintiff Indiana & Michigan Electric Company to cease treating the credit for deferred income taxes as a surplus account;

d. The Federal Power Commission on May 29, 1958, issued an order to the effect that all public utility companies subject to its regulations shall [illegible] include credit for deferred income taxes in a surplus account;

e. The Securities and Exchange Commission has promulgated a proposed policy in accord with the Committee's views.

Jurisdiction herein is based upon diversity of citizenship. Hence, the law of the State of New York is applicable. The plaintiffs predicate the validity of their complaint upon the doctrine of "prima facie tort." They rely upon the New York cases of *Advance Music Corporation* v. *American Tobacco Co.*, 296 N. Y. 79 (1946); *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348 (1941); *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226 (1941).

Subsequently, in other decisions New York courts have discussed this doctrine of so-called "prima facie tort." Among these are *Brandt* v. *Winchell*, 283 App. Div. 338 (1st Dept., 1954); *Brandt* v. *Winchell*, 286 App. Div. 249 (1st Dept., 1955), affirmed 3 N. Y. 2d 628 (1958); *Ruza* v. *Ruza*, 286 App. Div. 767 (1st Dept., 1955); *Knapp Engraving Co., Inc.* v. *Keystone Photo Engraving Corp.*, 1 App. Div. 2d 179 (1st Dept., 1956). See also *Benton* v. *Kennedy-Van Saun Mfg. & Eng. Corporation*, 2 App. Div. 2d 27 (1st Dept., 1956); *Travelers Indemnity Company* v. *Unger*, 4 Misc. 2d 955 (S. Ct., Queens Co., 1956); *Green* v. *Time, Inc.*, 147 N. Y. S. 2d 828 (S. Ct., N. Y. Co., 1955), affirmed 1 App. Div. 2d 665 (1st Dept., 1955), affirmed 3 N. Y. 2d 732 (1957).

The essential elements of "prima facie tort" include the following:

(1) There must be an intent to injure plaintiff, at least to the extent of infliction of *wrongful* harm upon plaintiff without just cause or excuse. *Beardsley* v. *Kilmer*, 236 N. Y. 80 (1923); *Ruza* v. *Ruza*, 286 App. Div. 767 (1st Dept., 1955); *Advance Music Corporation* v. *American Tobacco Co.*, 296 N. Y. 79 (1946).

In *Ruza* v. *Ruza*, *supra*, Mr. Justice Breitel wrote:

> "The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon—and which it is asserted caused the injury—are not, in the absence of the intention to harm, tortious, unlawful, and therefore,

> actionable. The remedy is invoked when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to plaintiff, all without excuse or justification." (p. 769)

In *Knapp Engraving Co. Inc.* v. *Keystone Photo Engraving Corp.*, 1 App. Div. 2d 170 (1st Dept., 1956), Mr. Justice Botein, now Presiding Justice of the First Department Appellate Division, wrote of prima facie tort:

> "It attempts to justify the omission of these conventional tort requirements on the ground that the counterclaim should be regarded as a 'prima facie tort'. A cause of action, however, must be judged by its allegations, not its label. A prima facie tort derives from the ancient form of action on the case, covering those situations where intentional harm has been inflicted, resulting in damage, by an act or series of acts which might otherwise be lawful and which do not fall within the categories of traditional tort actions (Aikens v. Wisconsin, 195 U. S. 194; Opera on Tour v. Weber, 285 N. Y. 348; American Guild of Musical Artists v. Petrillo, 286 N. Y. 226; Advance Music Corp. v. American Tobacco Co., 296 N. Y. 79; Brandt v. Winchell, 283 App. Div. 338, amended complaint dismissed 286 App. Div. 249)." (p. 172)

(2) Justification may be viewed as a neutralizing factor that overrides the intent to injure. What constitutes justification is a policy consideration.[1] In *Reinforce, Inc.* v. *Birney*, 308 N. Y. 164 (1954), Desmond, *J.* wrote:

> "* * * If the doers, by means not in themselves unlawful, of acts not in themselves unlawful, have any proper purpose to serve, they are not liable for the damage they cause (Peabody, Jr., & Co., v. Travelers Ins. Co., 240 N. Y. 511, 519; Al Raschid v. News Syndicate Co., 265 N. Y. 1). * * *" (p. 169)

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(1) Recent Developments in the New York Law of Prima Facie Tort, 32 St. John's Law Review, 282, 288.

In *Beardsley* v. *Kilmer*, 236 N. Y. 80 (1923) the concept of justification was expressed as follows:

> "* * * The question how far one individual shall be restrained from doing acts which are inherently proper out of respect for the rights of others is bound to be a delicate one. The proposition that a man may not dig a well upon his own land or enter upon a lawful business is one to be advanced with considerable caution and the cases seem firmly to establish the rule that if he digs a well because he really wants the water or starts the business for personal advantage or gain his neighbor is without remedy however much he suffers, and even though the act may also have been tinged with animosity and malice." (pp. 89-90)

In *Brandt* v. *Winchell*, 3 N. Y. 2d 628 (1958), Chief Judge Conway stated:

> "* * * The law is now settled in this State that, 'Even a lawful act done solely out of malice and illwill to injure another *may* be actionable.' (Al Raschid v. News Syndicate Co., 265 N. Y. 1, 4, emphasis supplied; see, also, Beardsley v. Kilmer, 236 N. Y. 80.) This is not to say that the present state of the law is that an act not otherwise tortious will, without exception become actionable when it is done with the blameworthy purpose of injuring another and such other is in fact injured. There are situations where for one of several reasons a court is constrained to ignore the wrongful motive of the actor. For example, a court may be prompted to disregard the actor's motive by reason of the paramount consideration of the public welfare. Accordingly, it may fairly be said that whenever the gist of an alleged cause of action (as here) is that an otherwise lawful act has become unlawful because the actor's motives were malevolent, the court is called upon to analyze and weigh the conflicting interests of the parties and of the public in order to determine which shall prevail." (pp. 634-635)

(3) Damages, which must be specially pleaded. *Rager* v. *McCloskey*, 305 N. Y. 75 (1953); *Braudt* v. *Winchell*, 286 App. Div. 249 (1st Dept., 1955), affirmed 3 N. Y. 2d 628 (1958); *Faulk* v. *Aware, Inc.*, 3 Misc. 2d 833, 839 (S. Ct., N. Y. Co., 1956) affirmed without opinion 3 App. Div. 2d 703 (1st Dept., 1957).

In *Braudt* v. *Winchell*, *supra*, the Appellate Division, 1st Department, in a per curiam opinion stated:

> "* * * The amended complaint proceeds solely on the theory of prima facie tort. As we previously noted, damage is an essential element in a cause of action for prima facie tort and must be pleaded specially, for it consists of injury due to loss in plaintiff's occupation or business (see 283 App. Div. 338, 342)." (p. 250)

Although "the most conspicuous use of the prima facie tort doctrine has been to create new causes of action where the plaintiff's claim does not fall within a traditional tort category,"[2] as Mr. Justice Breitel said in *Ruza* v. *Ruza*, 286 App. Div. 767 (1st Dept., 1955): "A bad complaint is not made good by the blanket assertion that it relies on the doctrine of 'prima facie tort.'" (p. 769)

Plaintiffs, although not members of the Institute, seek to force it to follow certain prerequisites to publication of opinions of the Institute's Committee. Plaintiffs, having adhered to certain accounting procedures for several years, have recorded in "restricted earned surplus accounts" some $65,000,000, representing credits for payment of federal income taxes which may have to be paid in the future. Now, urge the plaintiffs, the Institute's Committee's opinion will or may be accepted by the Securities and Exchange Commission in rulings on financial statements.

The facts in the case of *Advance Music Corporation* v. *American Tobacco Co.*, 296 N. Y. 79 (1946) are basically different from those in the present case:

(1). There, the defendant misrepresented the nature of the survey of the popularity of the songs presented based on sales—a fact not an opinion.

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[2] The Prima Facie Tort Doctrine, 52 Columbia Law Review 503, 512.

(2) The defendant's acts and representations definitely and directly affected plaintiff's sales. A business interference resulted.

(3) Damages naturally flowing from the acts and misrepresentations of the defendant and causally affecting the sales of the plaintiff were set forth.

(4) No justification for the defendant's acts appeared.

Here, the communications which defendants intend to promulgate do not mention plaintiffs. The plaintiffs, like other business enterprises which may be affected, may, if they so elect, appear before the appropriate governmental body to sustain their own contentions. There is no misrepresentation, no fraud. The acts of the defendants can hardly be termed wanton. The purposes of the defendant Institute are adequate justification, if justification, indeed, be required, to permit the proposed communications. There is no adequate proof (even if the plaintiffs had any right to insist on the Committee procedures they mention) that the Institute's rules have been or are about to be violated. In fact, the contrary appears.

There is no allegation that the method of accounting proposed by defendants is inherently false or fraudulent. On the contrary, it is supported by respectable authority. Neither is there any allegation of special damages, except in the most general and speculative terms.

This action is not to prevent interference with plaintiff's contracts, their sales or their property. It seeks to delay the distribution of an adverse opinion relative to accounting procedures. True, it may ultimately affect plaintiffs' application for credit. However, such a result is collateral, not direct, an effect which incidentally flows from a justifiable act. The plaintiffs may have grievances, but they relate to the distribution of honest opinions, not facts. No threat of intentional, unjustifiable harm to plaintiffs' business rights or property exists.

This court has been unable to find any precedent under the doctrine of prima facie tort or otherwise for a preliminary or final injunction forbidding a group from publishing and distributing opinions under circumstances equivalent or even similar to these.

Accordingly, the application for preliminary injunction must be denied and the complaint dismissed and summary judgment granted.

Settle order on notice.

RICHARD H. LEVET
United States District Judge

Dated: New York, N. Y.
May 20, 1959.

# APPENDIX C

Rule 12 of the Federal Rules of Civil Procedure.

"Rule 12. *Defense and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.*

* * * * *

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensible party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defease or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. [As amended Dec. 27, 1946, effective March 19, 1948.]"

* * * * *

Rule 56 of the Federal Rules of Civil Procedure.

"Rule 56. *Summary Judgment*

* * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

* * * * *

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

* * * * *

## APPENDIX D

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

*Appalachian Power Company, Ohio Power Company and Indiana & Michigan Electric Company, Petitioners,*

v.

*American Institute of Certified Public Accountants, E. H. Penney, William W. Werntz and Carman G. Blough.*

[July 7, 1959.]

MR. JUSTICE BRENNAN, Circuit Justice (temporarily assigned).

The petitioners apply for an order (1) staying the Mandate of the United States Court of Appeals for the Second Circuit on its judgment of June 17, 1959, affirming a summary judgment for respondents entered by the District Court for the Southern District of New York, and (2) restraining the respondents, pending the final determination of this action by this Court, from distributing to the members of the respondent American Institute of Certified Public Accountants or to any other members of the accounting profession a proposed letter dated April 15, 1959, or any other communication, to the effect that the respondent American Institute of Certified Public Accountants or its Committee on Accounting Procedure is of the opinion or recommends that a deferred tax account set up in recognition of the deferral of income taxes should not be credited to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

The petitioners, public utility companies which account for deferred taxes in the stockholders equity section of their balance sheets, brought this diversity suit in the District Court. They sought, in addition to other relief, an injunction against respondents promulgating or distributing said letter except upon compliance with certain

specified procedures. An interim restraint was granted pending hearing on a motion for preliminary injunction. Respondents made a motion to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. Affidavits were filed by both sides. The District Court heard the motions together, denied the motion for a preliminary injunction and, treating the motion to dismiss, since affidavits of both sides were filed, as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, entered summary judgment for the respondents. The District Court found that the letter of April 15 reflected the Committee's "honest opinions," that it was not "false or fraudulent" and that it could "hardly be termed wanton." The District Court held that, under such circumstances, the law of New York, which governs in this diversity case, does not provide a cause of action. The Court of Appeals unanimously affirmed.

The stay and temporary restraining order are sought by the petitioners upon allegations that respondents will distribute the letter, unless restrained, and this will cause petitioners irreparable injury and also render moot their proposed petition for certiorari, at least insofar as concerns their prayers for injunctive relief against such a distribution. Even assuming, however, the possibilities of irreparable injury and mootness, as claimed by the petitioners, I do not feel at liberty to grant their application unless in my judgment there is a prospect that the petition for certiorari which they propose to file will appear to at least four members of the Court to present questions which warrant our review.

I heard oral argument on this application and after consideration of the arguments made and the briefs filed, it is my judgment that the questions proposed to be presented in the petition for certiorari will not command four votes for review. The petitioners state that three contentions will be presented. One is that the District Court and the Court of Appeals erred in their conclusion as to the relevant state law. But this Court ordinarily accepts the determination of state law as found by the Court of Appeals, particularly when, as here, the same finding is made by the District Court, and no showing has been made to persuade me that such would

not be the case here. The second contention is that the District Court, in treating respondent's motion to dismiss as a motion for summary judgment, erred in not following the requirement of Rule 12(b) that "all parties shall be given reasonable opportunity to present all material made pertinent to such motion [for summary judgment] by Rule 56." But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts. And I do not find the conflict suggested by petitioners between the decision below and *Pacific American Fisheries* v. *Mallamey*, 191 F. 2d 137. That decision simply held that the District Court was incorrect in its conclusion as to the pertinent law, and that under the Court of Appeals' view of the law certain relevant facts were in dispute, so that the grant of summary judgment was improper. Finally, the petitioners suggest they will present in their petition for certiorari the question whether federal courts, in light of the First Amendment, are empowered to enjoin tortious communications. But the holdings below are that in the circumstances of this case the distribution by respondents of the proposed letter would not constitute a tortious act under New York law; therefore no First Amendment problem is involved.

The application is denied, since, in my judgment, none of the questions proposed to be presented in the petition for certiorari have the prospect of commanding four votes for review.

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No. 388

# Supreme Court of the United States

OCTOBER TERM, 1959

APPALACHIAN POWER COMPANY, OHIO POWER COMPANY AND INDIANA & MICHIGAN ELECTRIC COMPANY,
*Petitioners,*

v.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, J. H. PENNEY, WILLIAM W. WERNTZ AND CARMAN G. BLOUGH,
*Respondents*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF OF RESPONDENTS AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ET AL., IN OPPOSITION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF OF RESPONDENTS AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, ET AL., IN OPPOSITION

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In this case in which federal jurisdiction rests solely on diversity of citizenship, petitioners are here because of their disagreement with the holding below that the conduct of respondents, the American Institute of Certified Public Accountants (hereafter Institute) and three of its officials,[1] was not tortious

[1] The Institute, an incorporated body, is a non-profit, nation-wide, professional society, membership in which is open to all properly qualified certified public accountants and the purpose of

under the law of the State of New York. The Court of Appeals holding, of which review is sought, denied petitioners' claim that the circulation by respondents to the membership of the Institute of a letter expressing the opinion of the Institute's Committee on Accounting Procedure on an accounting question of general application and interest was a prima facie tort under New York law.

The District Court granted summary judgment in favor of respondents in an opinion examining in detail the applicable New York law (Petition, Appendix B). The Court of Appeals unanimously affirmed, stating that it agreed with the reasoned opinion of the District Court and holding that respondents' action involved no breach of duty owed by them to the petitioners (Petition, Appendix A). Mr. Justice Brennan, sitting as Circuit Justice, denied petitioners' application for a stay prohibiting the circulation of the letter pending action by this Court on a petition for writ of certiorari in an opinion in which he considered all of the contentions now advanced in the petition (Petition, Appendix D). The letter, circulation of which was prevented by petitioners for three months through interlocutory stays, was then distributed by the Institute to its members in July.

which is the furtherance of the ideals and principles of the accounting profession. The three individual respondents are the President of the Institute, Mr. L. H. Penney, the Chairman of the Institute's Committee on Accounting Procedure, Mr. William W. Werntz, and the Institute's Director of Research, Mr. Carman G. Blough.

## STATEMENT

The background of the litigation is as follows: In the summer of 1958, the Institute's Committee on Accounting Procedure had issued "Accounting Research Bulletin No. 44 (Revised)," which related to the accounting treatment of liberalized depreciation for tax purposes (D.C. pp. 140-142a).[2] This Bulletin took no express position as to the proper treatment of "accounts for deferred taxes" on corporate balance sheets. In December of 1958, the Securities and Exchange Commission issued a "Notice of Intention to Announce Interpretation of Administrative Policy." (D.C. p. 159) This notice by the SEC set forth a proposed administrative policy that "accounts for deferred income taxes" should not be placed in the stockholders' equity portion of a balance sheet and that to do so would be considered deceptive to investors, and requested comments thereon. The proposed SEC policy was in accord with the position already taken by the Federal Power Commission and the Indiana State Public Service Commission (D.C. pp. 56-59). At public hearings held by the SEC pursuant to this notice, the Institute's Director of Research testified that the opinion letter here in question had been approved by the Committee on Accounting Procedure and was being prepared for distribution; and he read into the public record the significant portion of the letter (Petition, Appendix B p. 5b). The letter reads as follows:

[2] As noted in footnote 1 of the Petition, there is no printed record in this proceeding. For convenience of the Court, the system of record citation references suggested by the petitioners will be followed and the numbered pages of the certified record from the District Court will be referred to as "D.C. p. ——" and those from that of the Court of Appeals as "C.A. p. ——".

"AMERICAN INSTITUTE OF CERTIFIED
PUBLIC ACCOUNTANTS

"270 Madison Avenue,
New York 16, N. Y.

"April 15, 1959

"To the Members of the American
Institute of Certified Public Accountants

"Gentlemen:

"Question has been raised with respect to the intent of the committee on accounting procedure in using the phrase 'a deferred tax account' in Accounting Research Bulletin No. 44 (revised), *Declining-balance Depreciation*, to indicate the account to be credited for the amount of the deferred income tax (see paragraphs 4 and 5).

"The committee used the phrase in its ordinary connotation of an account to be shown in the balance sheet as a liability or a deferred credit. A provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

"Three of the twenty-one members of the committee, Messrs. Jennings, Powell and Staub, dissented to the issuance at this time of any letter interpreting Accounting Research Bulletin No. 44 (revised).

"COMMITTEE ON ACCOUNTING PROCEDURE

"By William W. Werntz, Chairman"[3]

[3] The Committee on Accounting Procedure approved the letter and its circulation to the members of the Institute by a favorable vote of 18 of its 21 members. Of the 18 members favorably voting, 16 had been members of the Committee when Bulletin No. 44 (Revised) was issued sor months earlier, during 1958. These 16 constituted more than t -thirds of the members of the

As the letter was about to be circulated on April 15, 1959, petitioners filed a complaint seeking a judgment temporarily and permanently enjoining respondents from circulating the opinion letter "to the members of the Institute or to any members of the accountancy profession" and from adopting or issuing any statement similar to the opinion letter, unless and until the Institute had first:

> "(a) Submitted a draft of the proposed letter to the persons to whom the exposure draft of Accounting Research Bulletin No. 44 was submitted.
>
> "(b) Permitted such reasonable period of time, not less than 60 days, to have elapsed subsequent to said submission in order that such persons may have the opportunity of submitting for the consideration of the Committee their views and opinions.
>
> "(c) Otherwise complied with the Institute's and the Committee's practices and procedures with respect to the publication of Accounting Research Bulletins." (D.C. pp. 12-13)

Each of the petitioner utilities carries in its balance sheets large sums (aggregating over $65,000,000 for the

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Committee in office at that time. This plainly satisfied the requirement that the Committee act by a two-thirds majority of its members (Affidavit of Mr. William W. Werntz, Chairman of the Committee, Par. 11, and Ex. A, pp. 8-9, D. C. p. 56, 63a-64).

The Accounting Research Bulletins published by the Committee make clear that they represent *only* the opinions of the Committee, unless they have been specifically adopted by the Institute's membership. Neither by any law nor under the Institute's own rules do the statements have any authority beyond the force of their own reasoning. The Committee has discretion to work out its own procedures, except for the requirement that it act by a two-thirds majority, which it did here and the requirement that the Committee may only presume to speak for itself (*id.*, Par. 6 and 11, and Ex. A, p. 9, D. C. p. 53, 56, 64).

three) in an account for deferred federal income taxes, which account appears in the stockholders' equity section of the balance sheet (D.C. p. 4). Petitioners asserted that if the opinion letter were circulated, the "prestige and authority of the . . . Committee" will cause accountants, financial institutions, and governmental agencies to question such "continued inclusion of credits for deferred taxes in the earned surplus accounts" and that petitioners will therefore "be seriously interfered with in their dealings and relationships with such persons and institutions." (Complaint paragraph 29; affidavit of Mr. Donald C. Cook, a vice president of each of the petitioners, at paragraph 21, D.C. pp. 182-183).

As to the intent to injure, the complaint alleged merely that

> "30. The Institute and the Committee know that the foregoing [damage] will result . . . and intend that such . . . injury . . . shall occur. The actions of the defendants . . . are in wanton, reckless and wilful disregard of the said consequences of their proposed action" (D.C. pp. 11-12).

On the basis of the complaint and an accompanying affidavit, petitioners sought and obtained, without notice, from the District Court a temporary order restraining the circulation of the letter pending hearing and determination of an order to show cause why a preliminary injunction should not be issued (D.C. pp. 17-20). Respondents thereafter filed a cross-motion to dismiss for failure to state a claim on which relief could be granted (D.C. pp. 49-51). On May 6, the respondents served affidavits in opposition to the petitioners' application for an injunction, and later that day the parties exchanged briefs. A

reply affidavit by Mr. Cook, 28 pages in length with seven exhibits, was served upon the respondents late in the evening of May 6 (D.C. pp. 170-221). On May 7, the District Court held a hearing on the petitioners' application for preliminary injunction and the respondent's motion to dismiss. The petitioners' brief relied on Mr. Cook's affidavit in opposing the motion to dismiss; and in their argument on both motions petitioners did not differentiate between facts which came from the complaint and facts which came from affidavits.

On May 20, the District Court filed a full opinion, in which it concluded that because of the submission and consideration of matters beyond the pleadings, the motion to dismiss was to be treated as a motion for summary judgment under Rule 12(b) of the Federal Rules of Civil Procedure (D.C. pp. 222-236). The Court thereupon denied petitioners' application for preliminary injunction and granted summary judgment for respondents on the ground that no cause of action had been stated under New York law.

On May 25, counsel appeared before the District Court to settle the terms of the order. At no time during this hearing, which was approximately an hour-and-one-half in length, did petitioners suggest that they had any further material to offer in connection with summary judgment. The District Court granted petitioners' request for a stay only until the Court of Appeals could hear a motion for an injunction pending appeal (D.C. pp. 237-240).

Petitioners' motion in the Court of Appeals for such an injunction was set for argument on June 4.

On the preceding day, June 3, the parties exchanged voluminous briefs. Petitioners' brief raised for the first time the claim that they had been prejudiced by the District Court treating the case as being ripe for summary judgment. At the argument on June 4 the Court of Appeals determined, with the consent of the parties, that it would extend the injunction until its decision was handed down and that the case would be decided on the merits on the basis of oral argument and the submitted briefs (C.A. p. 1). On June 17, the Court of Appeals, in a unanimous per curiam decision, affirmed the judgment of the District Court and vacated its stay (C.A. pp. 14-16). On June 19, petitioners obtained a further stay pending an application to be made to and heard by a Justice of this Court not later than July 9 for a restraining order pending action by this Court on a petition for a writ of certiorari (C.A. pp. 24-26).

On July 7, Mr. Justice Brennan denied petitioners' application in an opinion which dealt explicitly with all the claims asserted in their petition and which concluded that none of these claims had the prospect of commanding four votes for review (Petition, Appendix D).

## REASONS FOR DENYING THE WRIT

As the petition itself reveals, petitioners' basic claim, which they now seek to have reviewed here, is that:

> "... the facts presented in the verified complaint established all of the elements of a prima facie tort under settled principles of New York law ...." (Petition, p. 4)

In other words, the petition rests on the claim that both the District Court and the Court of Appeals have

misapplied the New York doctrine of prima facie tort to the facts asserted by petitioners. This claim was fully considered by both courts below and properly resolved against petitioners. Even were this not so, however, a claimed misapplication of state law does not call for review by this Court.

The plain answer to petitioners' claim that the grant of summary judgment was improper is that, as the Court of Appeals found, petitioners were not denied the opportunity to present all relevant materials. At no time in the proceedings in the two courts below did plaintiffs ever indicate any fact not set out in their affidavits which could have changed the decision that under the applicable New York law they were not entitled to relief. Moreover, there is no conflict with the decision of any other Circuit.

## I

### THE DECISION OF THE COURT OF APPEALS ON A QUESTION OF NEW YORK LAW, UNANIMOUSLY AFFIRMING THE DISTRICT COURT, PRESENTS NO QUESTION WARRANTING REVIEW BY THIS COURT.

Petitioners contend that respondents are prima facie tortfeasors under the New York doctrine which provides for a cause of action "whenever one person [does] damage to another wilfully and intentionally, and without just cause or excuse." *Advance Music Corp.* v. *American Tobacco Co.*, 296 N.Y. 79, 70 N.E. 2d 401 (1946). It is the *Advance Music* case on which petitioners place their principal reliance.[4] The Dis-

[4] Petitioners also rely on two labor cases in which the New York Court of Appeals found, respectively, that persuading members not to work for plaintiff employer or with members of a rival plaintiff organization was not justified as a lawful labor

trict Court, however, concluded, after an extensive review of the New York law, that neither the *Advance Music* case nor any other precedent would justify any injunctive or other relief against the respondents for their seeking to publish and distribute the views of the Institute's Committee. Before the Court of Appeals, petitioners again fully briefed and presented their claims under the New York law. The Court of Appeals, in its opinion affirming the judgment in favor of respondents, stated that it agreed with the District Court's decision on the substantive law of New York.

A question of state law does not, of course, merit review by this Court. As the Court has indicated on many occasions, in this area it defers to the decisions of the lower federal courts—skilled in the law of particular states—unless their conclusions are shown to lack a rational basis. As will be shown, the decisions of both the courts below, which unanimously concluded that petitioners have no claim against respondents, were the result of a reasonable and rational application of New York law.

With respect to the *Advance Music* case, as the District Court made clear, it like the other decisions advanced by petitioners is wide of the mark. In the *Advance Music* case the New York Court of Appeals reversed a decision dismissing a complaint brought by a publisher of popular melodies against the sponsor, and its advertising agent, of a radio program known as "Your Hit Parade." The complaint alleged that the

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objective. Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E. 2d 349 (1941); American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E. 2d 123 (1941). We need not elaborate upon the point that these cases, involving words and action specifically aimed solely at the plaintiffs concerned, have nothing to do with the present case.

program falsely represented to its large audience that it had ascertained, on the basis of volume of sales, the nine or ten most popular melodies each week, and the order of their sales popularity; that in fact no such ascertainment was made at all; that the plaintiff's melodies were consistently excluded from the list, without justification, or were given an unjustifiably low ranking; that this was done with intent to injure the plaintiff; and that the plaintiff had, indeed, been injured by a refusal of jobbers and others to distribute plaintiff's melodies to dealers because of their omission or low ranking on "Your Hit Parade."

The *Advance Music* case was thus a perfectly clear case of wanton misrepresentation of fact and came very close to a case of common-law unfair competition. The present case is completely different. As pointed out in the opinion of the District Court, the proposed letter of the Committee on Accounting Procedure is simply an expression of professional opinion on a general accounting question. Moreover, it is not alleged that the opinion is not honestly held by the members of the Committee who voted to issue the letter. In fact, as noted by the District Court, the Committee's view is supported by most respectable authority (Petition, Appendix B, p. 6b).

The breaking point of petitioners' case is the simple and obvious fact that the basis of prima facie tort is *malicious injury*—doing a harm malevolently for the sake of the harm as an end in itself and not merely as a means to another end legitimately desired. The doctrine has recently been so delimited by the New York Court of Appeals in *Reinforce, Inc.* v. *Birney*, 308 N.Y. 164, 124 N.E. 2d 104 (1954), a case which

petitioners do not mention. In that case the court held:

> "If the doers, by means not in themselves unlawful, of acts not in themselves unlawful, have any proper purpose to serve, they are not liable for the damage they cause [citing cases.] Unions, as well as everyone else, may claim the benefit of the settled rule that 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another' [citing cases]." 308 N.Y. at 169-170, 124 N.E. 2d at 106.

Moreover, as recognized by the New York Court of Appeals in the *Advance Music* case, a prima facie tort case does not arise where there is "justification" for the act of which complaint is made. Here the purposes of the Institute—those of a voluntary, professional association—are adequate justification, if justification be required, for the proposed communication.

## II

THE TREATMENT OF THE CASE AS ONE FOR SUMMARY JUDGMENT UNDER RULE 12(b) WAS PROPER AND DOES NOT IN ANY WAY CONFLICT WITH A DECISION IN ANY OTHER CIRCUIT.

Rule 12(b) of the Federal Rules of Civil Procedure states that a District Court shall treat a motion to dismiss for failure to state a claim as a motion for summary judgment where matters outside the pleadings are before the court. It provides that in such circumstances all parties be given reasonable opportunity to present material pertinent to a motion for summary judgment.

Petitioner seeks to make out a conflict between the decision below and the decision in *Pacific American Fisheries, Inc.* v. *Mullaney*, 191 F. 2d 137 (9th Cir. 1951), on the propriety of entering summary judgment under Rule 12(b) in the circumstances of this case. There is no conflict.

The petition (pp. 10-11) discusses the *Pacific American Fisheries* case only by linking together widely separated sentences appearing at various places over three pages of the report of the opinion. This effort at plastic surgery fails to disclose what the decision was.

In the *Pacific American Fisheries* case, a non-resident fishing company had sued for injunction against enforcement of an Alaska fisheries tax which was greater for non-residents than for residents, and for a declaratory judgment of its invalidity. On a motion for temporary injunction, affidavits were filed. The District Court denied the motion on the ground that the facts did not show sufficient injury to warrant equity's interference with enforcement of a criminal statute (191 F. 2d at 139). Thereafter defendant—the Alaska Tax Commissioner—moved for judgment on the pleadings on the grounds that the statute had been held valid in a companion case recently decided by the Federal District Court in Alaska and that equity will not interfere with criminal prosecutions (*Ibid.*). On this motion the District Court entered summary judgment for the defendant, reciting that it had considered "matters outside of the pleadings," with a later minute entry explaining that there was no issue of fact "in view of the lack of power to grant injunctive relief." (*Id.* at 139-140).

The decision was reversed on appeal on the same day the same Court of Appeals reversed the decision in the companion case where the Federal District Court in Alaska had held the statute to be valid. *Anderson v. Mullaney*, 191 F. 2d 123, (9th Cir. 1951); *aff'd*, 342 U.S. 415.

The Court of Appeals held, first, that because the plaintiff had also sought declaratory relief, the mere showing that a case for injunction had not been made could not dispose of the case. (191 F. 2d at 140) Then, as to injunction, the Court held that, in view of its contemporaneous decision in the companion case, reversing the decision on which the lower court had relied, it would be most material to determine whether there was *in fact* a discriminatory burden on non-residents. (*Id.* at 141). Finally the Court held that "because of the importance of the issues presented in this suit" in no event should it have been disposed of by summary judgment. (*Id.* at 141).

Petitioners' case is not remotely similar. Here a motion for preliminary injunction, with voluminous affidavits—including petitioners' most exhaustive reply affidavit—and a motion to dismiss were briefed and argued together before the District Court. Both, in briefs and in argument to the District Court the material inside the pleadings and the material outside the pleadings were mingled together. Then, when the Court in a full opinion rendered summary judgment, the parties met with the Court for approximately an hour and a half on the settlement of the order and on the question of an injunction pending appeal. At no time in this session with the Court was there the slightest hint by the petitioners

that they had anything further to present or that they complained of the summary judgment disposition of the case. This card was kept close to the chest until the petitioners made their argument in the Court of Appeals.

What was done here by the District Court was perfectly natural and normal in the circumstances. To countenance petitioners' argument would encourage poker playing with District Courts instead of the candor to which they are entitled. The Court of Appeals is well equipped to exercise supervision over questions of practice of this sort in its Districts. It was not impressed by petitioners' plea of prejudice and concluded that petitioners were not denied the opportunity to present all relevant materials.

In a slight variation of their claim, petitioners contend that the District Court in granting summary judgment decided controverted issues of fact. They are vague as to precisely what issues of fact they consider both material and controverted. This is as it must be, since, under the relevant New York law as applied by the courts below, there were no controverted issues of material fact. Petitioners claim that the District Court decided against them issues concerning respondents' intent in publishing the Committee's letter, concerning whether the characterization of the letter as interpretative of a prior bulletin was false, and concerning the actual effect of the Committee's opinions. The District Court's opinion makes plain that on its view of New York law the allegations of petitioners on their side of these issues were insufficient in law to sustain their claim. Therefore, they are not material facts.

The Court of Appeals has not misread Rule 12(b). It has not rendered a decision in conflict with that of any other Court of Appeals, and it has not sanctioned the use of the summary judgment procedure to decide material issues of fact.

## III

### THE DECISION BELOW PRESENTS NO QUESTION AS TO THE EQUITY POWERS OF THE FEDERAL JUDICIARY TO ENJOIN TORTIOUS SPEECH.

As a Parthian shot, petitioners proffer as a reason to justify review by this Court the claim that the decision below presents the question of whether a court of equity has the power to enjoin tortious speech by a professional organization. The decision below presents no such question. Both the District Court and the Court of Appeals rulings were based on the flat holdings that distribution of the letter of the Committee on Accounting Procedure was, as a matter of New York law, not a tortious act.

Although a basic question under the First Amendment would arise if a court were to sustain petitioners in their efforts to throttle the expression of opinion by a public service organization such as the respondent Institute, no such issue is presented here. The ruling below did not involve the question of whether tortious speech could or could not be enjoined. It was rather a carefully documented determination by the District Court and by a unanimous Court of Appeals that the action of the respondents in distributing the letter expressing the Committee's opinion was not a tortious act under the applicable New York law.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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